

WO

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Emily Cota,

No. CV-18-02535-PHX-RM

Plaintiff,

ORDER

V.

Paul Penzone, et al.,

Defendants.

Pending before the Court is Defendants' Motion to Dismiss. (Doc. 18.) Plaintiff Emily Cota filed a combined Response and Motion to Amend Complaint, to which Defendants have responded. (Docs. 21, 22.) The motions are suitable for determination without oral argument.

I. Background

The Complaint contains the following allegations: on August 30, 2016, Plaintiff Emily Cota took the day off work to get together with family and mourn the death of her uncle, who had passed on August 29. (Doc. 1, ¶¶ 12–13.) Plaintiff spent the night at her grandmother’s house in West Mesa and was there at approximately 10:50 p.m. (*Id.*)

On the same day and time, at the intersection of Power Road and Apache Trail, Deputy A. Bratt observed a Ford Mustang with a Texas license plate registered to a Ford truck. (*Id.* ¶ 14.) There were four people in the vehicle: a female driver, a male front-seat passenger, and two female backseat passengers. (*Id.* ¶ 15.) Deputy Bratt followed the Mustang to a nearby Circle K and asked for the license and registration from the female

1 driver. (*Id.*) Deputy Fortner ran a warrant check on the driver and male passenger, while
2 Deputy Bratt spoke to the backseat passengers. (*Id.*)

3 Deputy Bratt had both backseat passengers exit the Mustang and asked if either had
4 marijuana on them. (*Id.* ¶ 16.) Both initially said no. (*Id.*) Subsequently, one of the
5 backseat passengers, who later claimed to be Emily Cota, admitted to having a marijuana
6 pipe in her purse. (*Id.*) The female claiming to be Emily Cota showed Deputy Bratt the
7 marijuana pipe, and Deputy Bratt detained her in the back of his patrol car. (*Id.* ¶ 17.)
8 Neither backseat passenger had identification, so Deputy Fortner and Deputy Bratt ran the
9 names provided by the females and compared their physical appearances to images
10 recorded with the Arizona Motor Vehicle Division (“MVD”). (*Id.*) Based on the
11 comparison, the deputies determined that both females had provided false information. (*Id.*
12 ¶ 18.)

13 Deputy Bratt asked the female claiming to be Emily Cota to provide a home address.
14 (*Id.* ¶ 20.) The address provided did not match the information in the MVD profile. (*Id.*)
15 Deputy Bratt asked for an address a second time. (*Id.* ¶ 21.) The female claiming to be
16 Emily Cota then stated she lived with the other occupants of the vehicle at 580 W.
17 Galveston Road, Chandler, Arizona. (*Id.*) The other occupants of the vehicle provided
18 their addresses, none of which were the Galveston Road address. (*Id.* ¶ 22.)

19 None of the four individuals were booked or fingerprinted to verify their identities.
20 (*Id.* ¶ 23.) Deputy Bratt and Deputy Fortner submitted charges against Plaintiff based upon
21 the information provided by the female claiming to be Emily Cota. (*Id.* ¶ 24.) The case
22 was submitted to the Maricopa County Attorney’s Office and, on February 8, 2017, a
23 summons was issued. (*Id.* ¶ 26.) On February 21, 2017, the summons was returned as
24 non-deliverable. (*Id.* ¶ 27.) On March 10, 2017, an arrest warrant for Plaintiff was issued.
25 (*Id.* ¶ 28.)

26 Sometime in November 2017, Plaintiff learned there was an outstanding warrant for
27 her arrest. (*Id.* ¶ 29.) On December 21, 2017, Plaintiff’s counsel filed a notice of
28 appearance and moved to quash the warrant. (*Id.* ¶ 30.) On January 8, 2018, Plaintiff

1 appeared for her initial appearance and was released on her own recognizance. (*Id.* ¶ 31.)
2 On February 7, 2018, following the presentation of evidence, a Maricopa County court
3 dismissed the case against Plaintiff without prejudice. (*Id.* ¶ 32.)

4 Plaintiff names as Defendants Deputy Bratt, Deputy Fortner, Maricopa County
5 Sheriff Paul Penzone, and the Maricopa County Sheriff's Office. She alleges seven claims,
6 each claim against all Defendants. She alleges three claims under 42 U.S.C. § 1983: one
7 for abuse of process, malicious prosecution, and failure to train (Count I), one for violation
8 of substantive due process (Count II), and one for violation of equal protection (Count III).
9 She also alleges state-law claims for abuse of process and malicious prosecution (Count
10 IV), intentional infliction of emotional distress (Count V), gross negligence and negligent
11 supervision (Count VI), and false arrest and imprisonment (Count VIII).¹

12 **II. Standard of Review**

13 Defendants move for dismissal under Rule 12(b)(6) of the Federal Rules of Civil
14 Procedure for “failure to state a claim upon which relief can be granted.” Fed. R. Civ. P.
15 12(b)(6). Dismissal under Rule 12(b)(6) “can be based on the lack of a cognizable legal
16 theory or the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri*
17 v. *Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988), *as amended*. To survive a
18 Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter,
19 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,
20 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
21 In other words, the complaint’s “non-conclusory factual content, and reasonable inferences
22 from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief.”
23 *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (internal quotation marks
24 omitted). “A claim has facial plausibility when the plaintiff pleads factual content that
25 allows the court to draw the reasonable inference that the defendant is liable for the
26 misconduct alleged.” *Iqbal*, 556 U.S. at 678. “Threadbare recitals of the elements of a
27 cause of action, supported by mere conclusory statements, do not suffice.” *Id.*

28 ¹ The Complaint skips Roman numeral “VII.”

1 A court evaluating a motion to dismiss must view the allegations of a complaint “in
2 the light most favorable to the plaintiff.” *Abramson v. Brownstein*, 897 F.2d 389, 391 (9th
3 Cir. 1990). All well-pleaded factual allegations of the complaint must be accepted as true,
4 although the same does not apply to legal conclusions couched as factual allegations.
5 *Iqbal*, 556 U.S. at 678–79.

6 **III. Discussion**

7 **A. Maricopa County Sheriff’s Office**

8 The Maricopa County Sheriff’s Office will be dismissed because it is a nonjural
9 entity that is incapable of being sued. *Braillard v. Maricopa County*, 232 P.3d 1263, 1269
10 (Ariz. Ct. App. 2010).

11 **B. Sheriff Penzone**

12 Plaintiff has failed to state a § 1983 claim against Sheriff Penzone. “A supervisory
13 official is liable under § 1983 so long as ‘there exists either (1) his or her personal
14 involvement in the constitutional deprivation, or (2) a sufficient causal connection between
15 the supervisor’s wrongful conduct and the constitutional violation.’” *Rodriguez v. County
16 of Los Angeles*, 891 F.3d 776, 798 (9th Cir. 2018) (quoting *Keates v. Koile*, 883 F.3d 1228,
17 1242–43 (9th Cir. 2018)). There is no *respondeat superior* liability for § 1983 claims.
18 *Felarca v. Birgeneau*, 891 F.3d 809, 820 (9th Cir. 2018) (citing *Jones v. Williams*, 297
19 F.3d 930, 934 (9th Cir. 2002)).

20 Plaintiff makes no attempt to defend her § 1983 claims against Sheriff Penzone.
21 Furthermore, Plaintiff fails to allege that Sheriff Penzone did any act at all, much less an
22 act that violated her constitutional rights. At most, Plaintiff alleges that Deputy Bratt and
23 Deputy Fortner conducted an inadequate investigation. By itself, that fact does not support
24 an inference that Sheriff Penzone failed to adequately train or supervise the deputies, or
25 that the deputies were acting pursuant to an unconstitutional policy or practice enacted by
26 Sheriff Penzone. *See City of Canton v. Harris*, 489 U.S. 378, 390–91 (1989) (“That a
27 particular officer may be unsatisfactorily trained will not alone suffice to fasten liability
28 [on the supervisor], for the officer’s shortcomings may have resulted from factors other

than a faulty training program.”). Plaintiff’s § 1983 claims against Sheriff Penzone for failure to train, abuse of process, and malicious prosecution (Count I), violation of substantive due process (Count II), and violation of equal protection (Count III) impermissibly rest on a *respondeat superior* theory. These claims will be dismissed, as will Plaintiff’s state-law claim for negligent supervision (Count VI).²

C. Abuse of Process & Malicious Prosecution³

Plaintiff has failed to state a § 1983 claim for abuse of process. The elements of abuse of process under Arizona law are “(1) a willful act in the use of judicial process; (2) for an ulterior purpose not proper in the regular conduct of the proceedings.”⁴ *Fappani v. Bratton*, 407 P.3d 78, 81 (Ariz. Ct. App. 2017) (quoting *Nienstedt v. Wetzel*, 651 P.2d 876, 881 (Ariz. Ct. App. 1982)). An improper purpose can be shown by demonstrating “that the process has been used primarily to accomplish a purpose for which the process was not designed.” *Nienstedt*, 651 P.2d at 881. Here, Plaintiff does not allege facts showing that the deputies submitted charges for an improper purpose. That the deputies did not investigate further after failing to identify the female does not by itself suggest they acted with an improper purpose.

Plaintiff contends that she has stated a claim because she has evidence that, prior to issuing a citation, the deputies found identification in the vehicle showing that the female claiming to be Emily Cota was in fact Tania Hernandez. This allegation was not included

² Negligent supervision is a form of direct liability. See *Humana Hosp. Desert Valley v. Maricopa Cty. Superior Court*, 742 P.2d 1382, 1386 (Ariz. Ct. App. 1987). Therefore, the lack of factual allegations against Sheriff Penzone is fatal to that claim. Plaintiff's other state-law claims will remain pending against Sheriff Penzone, however, because Arizona law (unlike federal law) provides that a supervisor may be vicariously liable for an employee's wrongful conduct. See *Wiggs v. City of Phoenix*, 10 P.3d 625, 627–28 (Ariz. 2000).

³ Plaintiff purports to bring “malicious and selective prosecution” claims. However, Plaintiff’s allegations in no way implicate a theory of selective prosecution. See *Awabdy v. City of Adelanto*, 368 F.3d 1062, 1071 (9th Cir. 2004) (explaining that a selective-prosecution claim requires proof that the plaintiff was prosecuted under a facially neutral law in a discriminatory manner). The Court therefore construes the Complaint as alleging only malicious prosecution.

In order for an abuse-of-process theory to support a § 1983 claim, the plaintiff must also allege that the defendant's conduct was done for the purpose of denying the plaintiff a "specific constitutional right." *See Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion); *Sexton v. Chino Valley Indep. Fire Dist.*, 7 Fed. App'x 660, 662 (9th Cir. 2001).

1 in the Complaint, however, and thus may not be considered.⁵ *Lee v. City of Los Angeles*,
2 250 F.3d 668, 688 (9th Cir. 2001) (stating general rule that “a district court may not
3 consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion” (quoting
4 *Branch v. Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994))). Next, Plaintiff contends that because
5 law enforcement has various tools to verify people’s identities (e.g., fingerprinting), the
6 submission of charges without first utilizing those tools “obviously would be an abuse of
7 process.” This argument rests on a flawed assumption: that an officer who inadequately
8 investigates a crime is necessarily acting with an ulterior, improper purpose. Whether or
9 not the deputies could have completed a more thorough investigation, the submission of
10 charges against an individual who illegally possessed paraphernalia, without more, is not
11 a use of the judicial process “so lacking in justification as to lose its legitimate function as
12 a reasonably justifiable litigation procedure.” *Nienstedt*, 651 P.2d at 882.

13 Plaintiff has also failed to state a § 1983 claim for malicious prosecution. This claim
14 requires a criminal prosecution “actuated by malice.”⁶ *Slade v. City of Phoenix*, 541 P.2d
15 550, 552 (Ariz. 1975) (citing *Overson v. Lynch*, 317 P.2d 948, 949 (Ariz. 1957)). Malice
16 exists when the defendant “further[s] some charge of crime from base and improper
17 motives; that is, from some motive other than a desire to have the laws enforced, crime
18 suppressed, and the guilty brought to justice.” *Leeker v. Ybanez*, 211 P. 864, 865 (Ariz.
19 1923). As explained above, Plaintiff fails to allege facts supporting an inference that the
20 deputies acted with a purpose other than enforcement of the law. Plaintiff’s assertion that
21 the deputies acted “with malice and/or with improper and unconstitutional motives” merely
22 restates the element and thus does not alter this conclusion. *See Twombly*, 550 U.S. at 555
23 (explaining that “a formulaic recitation of the elements of a cause of action” is insufficient
24 to state a claim).

25

26 ⁵ It should be noted that Plaintiff contradicts herself by alleging that “[n]either
27 female had identification.”

28 ⁶ For a malicious-prosecution theory to support a § 1983 claim, the plaintiff
must also allege that the defendant’s conduct was done for the purpose of denying the
plaintiff a “specific constitutional right.” *Lacey v. Maricopa County*, 693 F.3d 896, 919
(9th Cir. 2012) (en banc) (quoting *Freeman v. City of Santa Ana*, 68 F.3d 1180, 1189 (9th
Cir. 1995)).

1 Plaintiff's § 1983 claims for abuse of process and malicious prosecution (Count I)
2 will be dismissed. Plaintiff's state-law claims for abuse of process and malicious
3 prosecution (Count IV) will also be dismissed.

4 **D. Substantive Due Process & Equal Protection**

5 Plaintiff has failed to state a § 1983 claim based on the denial of substantive due
6 process. She alleges that Defendants violated 18 U.S.C. § 242, which makes it a crime for
7 state actors to deprive any person of constitutional rights "on account of such person being
8 an alien, or by reason of his color, or race." Assuming that a violation of § 242 is sufficient
9 to establish a substantive due process claim,⁷ Plaintiff's claim nevertheless fails. She does
10 not allege that she is an alien or a particular color or race, or that the deputies submitted
11 charges against her based on one of those characteristics. Consequently, her § 1983 claim
12 for violation of substantive due process (Count II) will be dismissed.

13 Plaintiff has also failed to state a § 1983 claim based on the denial of equal
14 protection to her "class of one." "In order to claim a violation of equal protection in a class
15 of one case, the plaintiff must establish that the [defendant] intentionally, and without
16 rational basis, treated the plaintiff differently from others similarly situated." *N. Pacifica*
17 *LLC v. City of Pacifica*, 526 F.3d 478, 486 (9th Cir. 2008). The plaintiff "must show that
18 the discriminatory treatment 'was intentionally directed just at him, as opposed . . . to being
19 an accident or a random act.'" *Id.* (quoting *Jackson v. Burke*, 256 F.3d 93, 96 (2d Cir.
20 2001) (per curiam)). Plaintiff's assertion that the deputies treated her "different from others
21 similarly situated" is not supported by the Complaint. It is not clear, for instance, which
22 individuals are similarly situated to Plaintiff. Furthermore, there are no allegations
23 supporting an inference that the deputies intentionally discriminated against Plaintiff, or
24 that the deputies had ever encountered Plaintiff prior to the traffic stop. Thus, her § 1983
25 claim for violation of equal protection (Count III) will be dismissed.

26

27 ⁷ "To constitute a violation of substantive due process, the alleged deprivation
28 must 'shock the conscience and offend the community's sense of fair play and decency.'" *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1195 (9th Cir. 2013) (quoting *Marsh v. County of San Diego*, 680 F.3d 1148, 1154 (9th Cir. 2012)).

1 **E. State-Law Claims⁸**

2 Plaintiff has failed to state a claim for intentional infliction of emotional distress.
3 This claim requires proof that (1) the defendant engaged in “extreme” and “outrageous”
4 conduct (2) with intent to cause emotional distress or reckless disregard that emotional
5 distress will occur, and (3) the plaintiff suffers severe emotional distress. *McKee v.*
6 *Arizona*, 388 P.3d 14, 20 (Ariz. Ct. App. 2016) (citations omitted). The trial court must
7 initially determine whether the alleged conduct meets the “high standard” for outrageous
8 conduct. *Johnson v. McDonald*, 3 P.3d 1075, 1080 (Ariz. Ct. App. 1999). Here, the
9 deputies’ alleged conduct cannot be described as “so outrageous in character, and so
10 extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as
11 atrocious and utterly intolerable in a civilized community.” *Id.* (quoting *Cluff v. Farmers*
12 *Ins. Exch.*, 460 P.2d 666, 668 (Ariz. Ct. App. 1969)).

13 Plaintiff has also failed to state a claim for gross negligence. In addition to the four
14 elements of a negligence claim,⁹ a claim for gross negligence requires a showing of
15 “[g]ross, willful, or wanton conduct.” *Noriega v. Town of Miami*, 407 P.3d 92, 98 (Ariz.
16 Ct. App. 2017) (quoting *Armenta v. City of Casa Grande*, 71 P.3d 359, 364 (Ariz. Ct. App.
17 2003)). Conduct is grossly negligent if “[i]t is flagrant and evinces a lawless and
18 destructive spirit.” *Cullison v. City of Peoria*, 584 P.2d 1156, 1160 (Ariz. 1978) (citations
19 omitted). For the reasons given above, nor can the deputies’ alleged conduct be

20 ⁸ Having dismissed all of Plaintiff’s federal-law claims, the Court could
21 decline to exercise supplemental jurisdiction over her state-law claims. 28 U.S.C. §
22 1367(c)(3). However, because Plaintiff will be given leave to amend the Complaint, the
23 Court will determine whether Plaintiff has adequately pleaded her state-law claims.
24 Plaintiff is advised, though, that if she fails to state a federal-law claim in her amended
25 complaint, the Court will decline to exercise supplemental jurisdiction over her state-law
26 claims. See *Parra v. PacifiCare of Ariz., Inc.*, 715 F.3d 1146, 1156 (9th Cir. 2013)
27 (“[O]nce the district court, at an early stage of the litigation, dismissed the only claim over
which it had original jurisdiction, it did not abuse its discretion in also dismissing the
remaining state claims.” (citing § 1367(c)(3))); *Sanford v. MemberWorks, Inc.*, 625 F.3d
28 550, 561 (9th Cir. 2010) (“[I]n the usual case in which all federal-law claims are eliminated
before trial, the balance of factors to be considered under the pendent jurisdiction
doctrine—judicial economy, convenience, fairness, and comity—will point toward
declining to exercise jurisdiction over the remaining state-law claims.” (citation omitted)).

⁹ Negligence requires (1) a duty of care; (2) a breach of the duty by the
defendant; (3) a causal connection between the breach and the plaintiff’s injury; and (4)
damages. *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007) (citing *Ontiveros v. Borak*, 667
P.2d 200, 204 (Ariz. 1983)).

1 characterized as grossly negligent.

2 Finally, Plaintiff has failed to state a claim for false arrest and imprisonment. “The
3 essential element necessary to constitute either false arrest or false imprisonment is
4 unlawful detention. A detention which occurs pursuant to legal authority, such as a valid
5 warrant, is not an unlawful detention.” *Slade*, 541 P.2d at 552 (citing *Catrone v. 105*
6 *Casino Corp.*, 414 P.2d 106 (Nev. 1966)). Accepting Plaintiff’s allegations as true, the
7 officers had probable cause to believe that the female claiming to be Emily Cota had
8 committed a crime, as she admitted to the possession of drug paraphernalia. *See Reams v.*
9 *City of Tucson*, 701 P.2d 598, 601 (Ariz. Ct. App. 1985) (stating that probable cause exists
10 if officer has reasonable grounds to believe a crime was committed and that a particular
11 person committed it). Probable cause is a defense to a claim of false arrest or
12 imprisonment. *Slade*, 541 P.2d at 552–53. That the deputies may have discovered the
13 suspect’s true identity with further investigation does not defeat a finding of probable
14 cause. *See id.* (finding officer had probable cause to arrest plaintiff although further
15 investigation would have revealed plaintiff committed no crime).

16 Accordingly, Plaintiff’s state-law claims for intentional infliction of emotional
17 distress, gross negligence, and false arrest and imprisonment will be dismissed.

18 **F. Leave to Amend**

19 “In dismissing for failure to state a claim, a district court should grant leave to amend
20 even if no request to amend the pleading was made, unless it determines that the pleading
21 could not possibly be cured by the allegation of other facts.” *Ebner v. Fresh, Inc.*, 838 F.3d
22 958, 963 (9th Cir. 2016) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).
23 The Complaint’s primary defect is a lack of factual allegations. Thus, Plaintiff will be
24 given leave to amend.¹⁰ Failure to support her claims with factual allegations may result
25 in dismissal of the amended complaint without leave to amend.

26 Defendants raise one other issue: that Deputy Bratt and Deputy Fortner are entitled

27 ¹⁰ The Motion to Amend, which seeks only to add a state-law defamation claim,
28 will be denied as moot because Plaintiff is being given leave to amend in connection with
the granting of the Motion to Dismiss. Plaintiff may add whatever claims she desires in
her amended complaint.

1 to qualified immunity. The Court will reserve ruling on this issue until an amended
2 complaint is filed. *See Broam v. Bogan*, 320 F.3d 1023, 1032–34 (9th Cir. 2003) (noting
3 that officers who ignore evidence negating probable cause are not entitled to qualified
4 immunity and concluding that plaintiffs could possibly amend their complaint to state valid
5 constitutional claims).

6 **IT IS ORDERED:**

7 1. The Motion to Dismiss (Doc. 18) is **granted**. The Maricopa County Sheriff's
8 Office is **dismissed with prejudice**. The Complaint (Doc. 1) is **dismissed with leave to
9 amend**. Plaintiff shall file her first amended complaint within **14 days** of the date this
10 Order is docketed.

11 2. The Motion to Amend (Doc. 21) is **denied as moot**.

12 Dated this 30th day of January, 2019.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Honorable Rosemary Márquez
United States District Judge